

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 728

POLICY STATEMENT ON IMPLEMENTING INTERCITY PASSENGER TRAIN ON-TIME
PERFORMANCE AND PREFERENCE PROVISIONS
OF 49 U.S.C. § 24308(c) AND (f)

Digest:¹ The Board proposed a policy statement that sought to provide guidance regarding issues that may arise and evidence to be presented in complaint proceedings under 49 U.S.C. § 24308(f). In this decision, the Board opts not to proceed with its proposed policy statement.

Decided: July 28, 2016

On December 28, 2015, the Board issued a proposed Policy Statement that sought to provide guidance regarding issues that may arise and the evidence to be presented in complaint proceedings under 49 U.S.C. § 24308(f). That provision allows the Board to initiate an investigation on its own, and requires the Board to initiate an investigation upon complaint by the National Railroad Passenger Corporation (Amtrak) or others, to determine whether the failure of intercity passenger trains to achieve 80 percent on-time performance is due to causes that could reasonably be addressed by a host carrier, Amtrak, or other intercity passenger rail operators. If the Board finds that service delays are attributable to the host carrier's failure to provide preference to Amtrak trains as required by 49 U.S.C. § 24308(c), the Board may award damages or other appropriate relief.

The proposed Policy Statement discussed the relevant statutory provisions and included suggestions regarding the evidence that might be used in the course of § 24308(f) investigations. In its guidance, the Board also proposed to take a systemic view toward the freight railroads preference obligation, noting that a "dispatching decision that may appear, in isolation, to favor freight over passenger efficiency may ultimately promote efficiency and on-time service for passenger trains on the network generally." Proposed Policy Statement 4. In issuing its proposed Policy Statement, the Board noted that it was not making any binding determinations and was issuing the statement merely as a "potential starting point for parties to consider when developing evidence for § 24308(f) proceedings." Proposed Policy Statement 3. The Board

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

sought to facilitate some degree of mutual understanding among potential parties to § 24308(f) proceedings as to how investigations would be conducted and thus reduce the duration and cost of such proceedings. The Board intended the proposed Policy Statement to serve as a means of facilitating a more efficient and expeditious implementation of § 24308(f) proceedings. However, the Board also recognized that, given “the fact-specific nature of § 24308(c) preference issues,” its approach to these issues would likely be refined in individual § 24308(f) proceedings. Id.

The Board sought public comment on its proposed Policy Statement, indicating that it could revise it, as appropriate, after consideration of the comments received. Numerous comments were filed by host freight rail interests, passenger rail interests, and others.² Host freight carriers express general support for the Board’s proposed Policy Statement, arguing that the preference requirement should not be considered to be absolute and that a systemic, global approach should be used in determining whether a host carrier has granted a passenger train preference. (Association of American Railroads (AAR) 6-12; CSX Transportation Inc. (CSXT) 2-3; Grand Trunk Western Railroad Co. and Illinois Central Railroad Co. (CN) 2, Norfolk Southern Railway (NSR) 4.)³ The host carriers also provided several comments and suggestions regarding the Board’s proposals for evidence to be considered in § 24308(f) investigations.⁴

Amtrak and other passenger interests⁵ urge the Board to withdraw its proposed Policy Statement, arguing that an interpretation of preference as not being absolute contradicts the plain

² Comments were also filed by United States Department of Transportation, as described below, and the Tri-County Bicycle Association.

³ The Virginia Railway Express and the Association of Independent Passenger Rail Operators also filed comments in support of the proposed Policy Statement.

⁴ For example, CSXT and CN expressed concerns about the reliability of Amtrak’s Conductor Delay Reports or similar train performance data that allegedly cannot be validated. (CSXT 6, CN 9.) AAR and CN argued that the Board should not impose liability on a host for failing to provide preference if the host has performed in accordance with its operating agreement with Amtrak. (AAR 12, CN 6.) AAR and CSXT urged the Board to consider the reasonableness of Amtrak’s schedule for the train in question as an important element of any root-cause investigation. (AAR 14; CSXT 5.) The host carriers stressed the limited relevance of comparing the on-time performance of passenger service with freight service (AAR 15; CSXT 7, NSR 23), and some noted that comparing the relative speed of freight and passenger traffic (CSXT 8) or the head-to-head delays between passenger and freight trains (CN 9) would be more probative of a host railroad’s efforts to provide preference.

⁵ Several individual citizens, as well as the following parties, expressed similar concerns to those expressed by Amtrak: United States Senators Roger Wicker, Cory Booker, and Richard Durbin; United States Representative Peter DeFazio; Gov. Kate Brown (Oregon); mayors and representatives of the Cities of Yuma, Ariz., Tucson, Ariz., Milwaukee, Wis., Tacoma, Wash., Columbia, S.C., Durham, N.C., Norfolk, Va., Newport News, Va., Vancouver, Wash., Niagara Falls, N.Y., Eugene, Ore., Portland, Ore., Albany, Ore., and Salem, Ore.; North Carolina

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and unambiguous statutory language. Amtrak asserts: “If a host railroad does not resolve an individual dispatching decision at a rail line, junction or crossing in favor of Amtrak, then Amtrak does *not* have preference over the freight train in using that rail line, junction or crossing.” (Amtrak 10 (emphasis in original).) Amtrak contends that, except for situations involving an emergency or where the host carrier has filed for and been granted preference relief under § 24308(c), no other factors or circumstances could be found to be “an appropriate mitigating factor” for a host railroad to provide preference. (*Id.* at 23.) Amtrak further argues that a construction of preference that considers the quality of service to freight shippers would conflate the definition of preference with the statutory provision that allows a host carrier to seek relief from its preference obligation by demonstrating that preference would materially lessen the quality of freight transportation provided to shippers. (*Id.* at 13.) The United States Department of Transportation also submitted a comment, stating that the Board’s proposed Policy Statement was “premature and unnecessary” and that preference issues should be addressed on a case-by-case basis.

As the record demonstrates, the host carrier and passenger rail parties hold very different views on fundamental issues concerning the relevant statute, including the interpretation of “preference.” In light of the broad disagreement among the interested parties regarding the conceptual basis for § 24308(f) investigations, the Board finds that going forward with its Policy Statement would not advance its original goal of facilitating a more efficient and effective implementation of § 24308(f) proceedings. To the contrary, continued efforts to develop the Policy Statement under these circumstances would unnecessarily delay the Board’s resolution of pending and future on-time performance investigations—the very opposite of the purpose in commencing this proceeding. As stated in the proposed Policy Statement, § 24308(c) preference issues are fact-specific in nature, and, after reviewing the comments, the Board concludes that its approach to preference issues can be developed and refined in the context of specific § 24308(f) cases. Therefore, the Board will withdraw its proposed Policy Statement and discontinue this proceeding.

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Department of Transportation; Capitol Corridor Joint Powers Authority; Maryland Transit Administration; Southern Rail Commission; States for Passenger Rail Coalition; Virginia Rail Policy Institute; National Association of Railroad Passengers; Midwest Interstate Passenger Rail Commission; Sacramento Area Council of Governments; National Disability Rights Network; Samuel J. Nasca, on behalf of SMART/Transportation Division, New York State Legislative Board; Environmental Law and Policy Center; All Aboard Indiana; All Aboard Ohio; All Aboard Wisconsin; Friends of the Cardinal-Charleston, WVA; Midwest High Speed Rail Association; the National Association of Railroad Passengers; and Virginians for High Speed Rail.

It is ordered:

1. The proposed Policy Statement is withdrawn.
2. This proceeding is discontinued.
3. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.